



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 53 OF 2013

MEHUL NANADALAL SHAH.....PLAINTIFF

VERSUS

GIDEON KIOKO MBUVI.....DEFENDANT

R U L I N G

1. For determination by the court is the Defendant's preliminary objection pleaded at paragraph 4(1) of the statement of defence, which stated:-

“The Defendant avers further that the suit is time barred”.

2. On the 21/2/2017, the court directed that, that objection be heard in *Limine* by way of parties filing submissions in that regard. Pursuant to that direction the defendant filed a written submissions on the 17/5/2017 while the plaintiff did so on the 19/6/2017 and parties attended court on the 6/3/2018 to highlight the same.

3. In its submissions the defendant points out that the cause of action as pleaded by the plaintiff allegedly arose in the yet 1995 when the defendant is accused of having led the plaintiff to believe that the defendant had the capacity to facilitate the purchase by the plaintiff of a beach plot within Nyali area, Mombasa County, which representation led to an agreement of sale dated 29/9/1995 for the sale of CR Number 19130 MV/1/1701 comprising 0.5140 HA from Kshs.14,000,000/=.

4. The plaintiff the pleads that pursuant to the said agreement and payment of the agreed deposit of Kshs.2,500,000/= be discovered that the representation made to him were not genuine and that the person disclosed as the vendor was not the owner of the property.

5. As a consequence the plaintiff pleads particulars of fraud against the defendant together with particulars of loss so occasioned being the sum paid to the defendant, the agreed compensation of Kshs.4,000,000/= and loss of wealth by virtue of the loss of prospective value of the property at Kshs.180,000,000/=.

6. It is further pleaded that pursuant to the discovery the parties did execute an agreement dated 24/5/1996 in which the defendant acknowledged the fraud and undertook to pay to the plaintiff the sum of Kshs.4,000,000/= by instalments with effect for the 30/1/1998 and in default the plaintiff would get a penalty interest of 30% per month on the sum outstanding till payment in full. On that agreement, the plaintiff pleaded at paragraph 14 that the defendant totally failed to pay as agreed hence the suit.

7. Based on those facts and noting that the plaintiff while appreciating that the claim was statute barred, the plaintiff did vide **Misc Application No. 3 of 2013 (OS)** which sought and obtained an Order to file suit out of time. On those facts the defendant submits that the order granting leave to file suit out of time was improperly given and can only be challenged at trial and by the trial court. The defendant cited to court the decision of the court of Appeal in ***Mary Wambui vs Kenya Bus Services Ltd [1997] eKLR.***

8. On the cause of action the defendant contends that even if the suit was to be seen to be grounded on a fraud, which is a tort, such tort is grounded on the agreement hence a contract. Either way the defendant submits that the plaintiff acknowledged having been caught up by Limitation of time and sought the extension of time. To the defendant there was an error in granting extension off time because under section 27 of Cap 22, an Order for extension of time can only be granted in cases for damages for negligence, nuisance or breach of duty and the damages consist of or include damages for personal injuries of any person.

9. To the defendant, in the suit the damages sought are not in respect of personal injury to the plaintiff hence the judge was wrong in extending time.

10. For the plaintiff, submissions were offered to the effect that there were two agreements between the parties dated as aforesaid and that the plaintiff clearly had a cause of action against the defendant. The decisions in *V.K. Construction Co. Ltd vs Mpatu Investments Ltd* and *Kenya Cargo Handling Servics vs Ugwang [1998] KLR 593* were cited for the proposition of law that a Claim made outside the time limited by the Act does not deprive the suit of chances of success and that the purpose of limitation of actions Act is directed against delay in commencing legal proceedings which may lead to injustice.

11. The plaintiff then sought to support the finding and reasons given by Mwongo J in extending time principally on the basis that the cause of action here was grounded on two contracts. To the plaintiff the objection was raised without merit and ought to be dismissed.

Analysis and determination

12. From the submissions filed, it is clear that the only question this court must pose and answer is whether in extending the time within which to file suit by the ruling dated 12/3/2013 the court acted correctly and in accordance with the law. This is not to say that this court is acting as an appellate court to that judge of concurrent jurisdiction. NO. The only reason the court interrogate that is because by law, orders extending time to file suit sought prior to filing suit are made *ex parte* and it is only at trial that the law allows the trial judge to re-look at the same.

13. In *MARY WAMBUI KABUGU VS KENYA BUS SERVICES LTD [1997] eKLR* the Court of Appeal said:-

“The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for outcoming time bar. He is not the least bound by the provisioned view expressed by the judge in chambers who gave leave”.

14. This reasoning flows from the position of the law that a judge considering an application to extend time is bound to look no further than whether the evidence adduced at that juncture show that if the claim were brought in time it would, in the absence of other evidence to the contrary be sufficient to disclose a cause of action apart for any defence under section 4(2)[\[1\]](#).

15. With that in mind, Judge Muongo said;

“Clearly this court is not obliged to consider the position portions of the defence under the limitation of this stage...the evidence is sufficient to establish the cause of action if the plaint were filed”.

16. I am in no doubt that at the juncture Judge Mwongo made his determination to extend time the law did not oblige him to consider the merits of the matter beyond the provisions of Section 28(2) of the Limitation of Actions Act.

17. Now, before me is whether the grant of Orders extension of time should be left to stand or be set aside.

18. I understand the law under section 27 to be that for one to be entitled to an order for extension of time to file suit out of time, he must be launching his claim on a cause of action grounded on negligence, nuisance or breach of duty, founded upon a contract of written law and the damages claimed are in respect of or include those for personal injury.

19. Here the suit is clearly for recovery of the sum contracted under the agreement of 24/5/1996 and the consequential loss of bargain flowing from the agreement of 29/9/1995. That to me present a cause of action grounded on a contract which by dint of Section 4(1) ought to be brought not later than six years from the date it accrues. For the action grounded on the agreement of 29/9/1995, the same ought to have been filed not later than the 28/9/2001 while any case grounded on the agreement date 24/5/1996 ought to have been filed not later than the 23/5/2002. The plaintiff was clear and absolutely right in his interpretation of the law on limitation when he sought to have the time extended. However the same plaintiff was plainly wrong in his appreciation that there was the right and jurisdiction on the court to extend time to court file suit for the recovery of sum based on a contract and for damages that were not in respect of personal injury.

20. I hold and find that there is no jurisdiction on the court to grant extension of time beyond the parameter set by Section 27(1) and (2) of Cap 22. In *Willis Onditi vs Gateway Insurance Ltd [2014] eKLR* the word of appeal said:-

“Under section 27, as can be gleaned from the provisions cited above, time to filesuit can only be extended where the action is founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff resulting from the tort!!”.

21. And in *Mary Osundwa vs Nzoia Sugar Company Ltd [2002] eKLR* the same Court of Appeal said of Section 27, Cap 72:-

“The section does not give jurisdiction to the courts to extend time for filing suits in cases involving contracts or other causes other than those in tort”.

22. With the foregoing otherwise settled position of the law, I do find that the orders issued by the court on the 12/3/2013 were given without jurisdiction are therefore subject to being set aside. I do set them aside.

23. Having so done, it follows that the suit was filed out of time and was thus statute barred. That being the case this court has no jurisdiction to entertain it and must order that it be struck out. It is therefore struck out with costs to the defendant.

Dated and delivered at Mombasa this 13th day of March 2018.

P.J.O. OTIENO

JUDGE

Mr. Gathuku: We seek leave to appeal against the ruling and that we be provided with proceedings and certified ruling from the appeal.

Mr. Omolo: No objection if leave is required.

Court: Leave is granted to the plaintiff to file an appeal against the ruling of this afternoon. The certified copies of the proceeding and ruling shall equally be provided to the plaintiff upon payment of requisite court fees.

Hon. P.J.O. Otieno J

13/3/2018

[\[1\]](#) Section 28(2) Limitation of actions Act